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No. 95-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ST. PAUL MERCURY INSURANCE COMPANY
and NORTH AMERICAN CONSTRUCTION
CORPORATION

Petitioners,

v.

B & D MECHANICAL CONTRACTORS, INC.

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the federal courts have exclusive jurisdiction of Miller Act cases?

2. Can a statutory venue provision be, simultaneously, a jurisdictional requirement?

3. Can parties through an otherwise valid forum selection clause agree to resolve their Miller Act claims in a forum other than federal district court?

4. Did the Court of Appeals correctly interpret the contract as precluding dismissal or transfer of this case?

LIST OF ALL PARTIES

B & D Mechanical Contractors, Inc.

Plaintiff-Appellant/Cross-Appellee,

North American Construction Corporation
St. Paul Mercury Insurance Company

Defendants-Appellees/Cross-Appellants

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

LIST OF ALL PARTIES . . . . . (ii)

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

I. The Decision of the Court of Appeals Is In Conflict with This Court's Decision in Rich and Other Courts of Appeals . . . 7

A. Legislative History of The Miller Act Supports Reversal 14

B. Federal Courts Do Not Have Exclusive Jurisdiction of Miller Act Claims 17

II. Interpretation of This Forum Selection Clause Is Not Dispositive 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES:

Alleva v. Maryland Casualty Co.,
287 N.Y.S. 583 (N.Y.S.C. 1936) 16

Arrow Plumbing and Heating, Inc. v.
North American Mechanical Services Corp.,
810 F.Supp. 369 (D.R.I., 1993) 23, 25

Blanchard v. Terry & Wright, Inc.,
331 F.2d 467 (6th Cir. 1964), *cert. denied*,
379 U.S. 831 9

Charles Dowd Box Co. v. Courtney,
368 U.S. 502 (1962) 19

Claflin v. Houseman, 93 U.S. 130 (1876) 19

Clifford F. MacEvoy Co. v. United States ex rel.
Calvin Tompkins Co., 322 U.S. 102 (1944) 21

F.D. Rich Co., v. United States ex rel.
Industrial Lumber Co., 417 U.S. 116 (1974) . . . . passim

FGS Constructors, Inc. v. Carlow,
64 F.3d 1230 (8th Cir. 1995),
petition for cert. filed, 64 U.S.L.W. 3503
(U.S. Dec. 4, 1995) (No. 95-1102) 6, 10, 12

Fleisher Engineering & Constr. Co. v.
United States ex rel. Hallenbeck,
311 U.S. 15 (1940) 21

Free v. Bland, 369 U.S. 663 (1962) 21, 26

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473, 478 (1981) 21

In re Fireman's Fund Ins. Co., 588 F.2d 93
(5th Cir. 1979) 11, 12

Jim Cooley Construction, Inc. v.
North American Construction Corp. and
St. Paul Mercury Insurance Co.,
Case No. CIV-93-1813 28

Koppers Co., Inc. v. Continental
Casualty Co., 337 F.2d 499, (8th Cir. 1964) 9, 10

Lee v. Chesapeake & O. Ry. Co.
260 U.S. 653, 655 (1923) 14

Maine v. Thiboutot, 448 U.S. 1 (1980) 18

McPhee v. United States ex rel.
Montrose Hardware Co., 174 P. 808 (Colo. 1918) . . 15

Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342
(10th Cir. 1992) 23

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) . . . 21, 26, 27

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 6

Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939) 13, 14, 27

Nunn v. Chemical Waste Management, Inc., 856 F.2d 1464, at 1467 (10th Cir. 1988) 24

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 21, 26, 27, 28

Socony Mobil Oil Co. v. Humble Oil & Refining Co., 387 F.2d 155, 157 (10th Cir. 1967) . . 24

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 21

Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988) 23, 24, 28

Tafflin v. Levitt, 493 U.S. 455, 458-459 (1990) . passim

Texas Constr. Co. v. United States ex rel. Caldwell Foundry and Machine Co., Inc., 236 F.2d 138 (5th Cir. 1956) 12

United States Fidelity and Guaranty Co. v. Hendry Corp., 391 F.2d 13, at 18 (5th Cir. 1968), *cert. denied*, 393 U.S. 978 . . . . 9, 10, 11,15

United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Ins. Co., 832 F.2d 1150 (9th Cir. 1987) 11

United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co., 297 F.2d 665 (2nd Cir. 1962) 9, 11, 17, 18

United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2nd Cir. 1966), *cert. dismissed*, 385 U. S. 924 . . . . . passim

United States ex rel. General Rock & Sand Corp. v. Chuska Dev. Corp., 55 F.3d 1491 (10th Cir. 1995) 8

United States ex rel. Harvey Gulf International Marine, Inc. v. Maryland Casualty Co., 573 F.2d 245 (5th Cir. 1978) 12, 13, 16

United States ex rel. Owens-Corning
Fiberglass Corp. v. Brandt Constr. Co.,
826 F.2d 643 (7th Cir. 1987), *cert. denied*,
484 U.S. 1026 (1988) 9, 11, 16

United States ex rel. Pittsburgh
Tank & Tower v. G & C Enterprises, Inc.,
62 F.3d 35 (1st Cir. 1995) . . . . . passim

United States ex rel. Standard Furniture Co.,
v. Henningsen, 82 P. 171 (Wash. 1905) 15

Yates v. Jones National Bank,
206 U.S. 158 (1907) 19

Yellow Freight Sys., Inc. v. Donnelly,
494 U.S. 820 (1990) 18, 19, 20

OTHER AUTHORITIES:

18 U.S.C. §1961-1968 18

28 U.S.C. §124(d)(4) 22

28 U.S.C. §1254(1) 2

28 U.S.C. §1334(a) 19

28 U.S.C. §1352 . . . . . passim

28 U.S.C. §1404(a) 23, 24

28 U.S.C. §1406(a) 23, 25

28 U.S.C. §1441 et. seq. 23

29 U.S.C. 185 9

40 U.S.C. §270(a)-(d) . . . . . passim

42 U.S.C. §1983 19

42 U.S.C. §2000e 18

28 Stat. 278 14

30 Stat. 1167 16

Fed.R.Civ.P. 12(b)(3) 23, 25

Stickells, Bonds of Contractors on
Federal Public Works. The Miller Act,
36 B.U.L. Rev. 499 at 502-507 (1956) 16

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OCTOBER TERM, 1995

ST. PAUL MERCURY INSURANCE COMPANY
and NORTH AMERICAN CONSTRUCTION
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Petitioners,

v.

B & D MECHANICAL CONTRACTORS, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, St. Paul Mercury Insurance Company ("St. Paul") and North American Construction Corporation ("North American"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on November 13, 1995.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 70 F.3d 1115 (10th Cir. 1995) (App. 1).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 13, 1995. Petitioners timely filed a Petition for Rehearing (App. 9) which was denied on December 11, 1995. (App. 18). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 40, Section 270a:

Bonds of contractors of public buildings or works.

(a) Type of bonds required. Before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.

United States Code, Title 40, Section 270b:

Rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor . . . shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him:

> (b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere.

United States Code, Title 28, Section 1352:

> Bonds executed under federal law. The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

STATEMENT OF THE CASE

On April 7, 1992, North American employed Respondent, B & D Mechanical Contractors, Inc. ("B & D"), as a subcontractor to perform a portion of the work North American, as general contractor, had agreed to perform for the United States Government. The project involved the construction of a groundwater treatment system at Tinker Air Force Base, located in Oklahoma County, Oklahoma. As required by 40 U.S.C. §270a of the Miller Act, St. Paul issued the payment bond for this public project.

The subcontract between North American and B & D contained a forum selection clause which provided that "[t]he

Subcontract Agreement and any claim arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas." (App. 23)

During construction, a dispute developed between the parties which resulted in litigation filed by B & D against North American and St. Paul on February 22, 1994. B & D's Complaint was filed in the United States District Court for the Western District of Oklahoma, the federal district which includes Tinker Air Force Base. B & D alleged breach of its subcontract with North American resulting from non-payment of amounts allegedly due and claimed a right to recover for such unpaid amounts against the payment bond issued by St. Paul.

In reliance on the forum selection clause in the subcontract, Petitioners moved to dismiss B & D's Complaint based on improper venue. On August 22, 1994, the District Court granted Petitioners' Motion to Dismiss. (App. 20).

B & D appealed the District Court's judgment to the United States Court of Appeals for the Tenth Circuit. On November 13, 1995, the Court of Appeals reversed the judgment of the District Court and remanded the case to the District Court for trial on the merits. Petitioners' timely petition for rehearing was denied on December 11, 1995.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals is contrary to the decision of this Court in F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974).

The judgment of the Court of Appeals is in conflict with the decision of another Court of Appeals: FGS Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Dec. 4, 1995) (No. 95-1102).

This case is of national importance. The Miller Act applies to hundreds if not thousands of transactions on an annual basis. Contractors on public projects employing numerous suppliers and subcontractors, both local and out-of-state, must be able to assess the risk of burdensome litigation in a foreign jurisdiction and the continued viability of forum selection clauses first recognized as valid in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). The fundamental issue in this case is the enforceability of private agreements related to the place and manner in which parties are willing to resolve their commercial disputes.

I. The Decision of the Court of Appeals Is In Conflict with This Court's Decision in Rich and Other Courts of Appeals

The Miller Act, 40 U.S.C. §§270a-d, requires the general contractor on any public project to post both a performance bond and a payment bond. 40 U.S.C. §270a(a). In Section 270b(a) of the Act, suppliers and subcontractors of the general contractor are granted the right to sue on such payment bond for any unpaid amount.[1] Section 270b(b), the focus of this appeal, provides that such suits

> shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere.

Interpreting this language in F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974), this Court held "§270b(b) is merely a venue requirement." Id. at 125.

In the Opinion below, the Court of Appeals recognized the holding in Rich and acknowledged that even prior to that decision "courts deciding the issue had held almost without exception that [Section 270b(b)] was a venue

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[1]United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705, at n. 3 (2nd Cir. 1966), *cert. dismissed*, 385 U.S. 924.

provision." (App. 5). Nonetheless, the Court concluded that Section 270b(b) "grants federal courts exclusive jurisdiction." (App. 6).[2] This holding is contrary to Rich.

To support its Opinion, the Court of Appeals cites two decisions: one from its own Circuit and one from the Seventh Circuit. In United States ex rel. General Rock & Sand Corp. v. Chuska Dev. Corp., 55 F.3d 1491 (10th Cir. 1995), a different panel of the Tenth Circuit held that a letter of credit required by an Indian Housing Authority was not a "payment bond", consequently, the Miller Act did not apply. Prior to deciding this issue, the Court, in dicta, wrote that Section 270b(b) of the Miller Act "grants the federal district courts exclusive jurisdiction over such actions." Id. at 1493. This dicta in Chuska is also contrary to Rich.

Likewise, the other case cited by the Court of Appeals does not support the conclusion that federal courts have exclusive jurisdiction of Miller Act claims. In United

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[2]While the Court of Appeals does not specifically reference any portion of the Miller Act to support its holding, Section 270b(b) is the only one which the Court did discuss or to which it could have had reference. Section 270a refers only to the bonding requirements and does not contain any grant of jurisdiction. Section 270b(a) grants a private right of action against the bond to unpaid suppliers, subcontractors and parties contracting with them but does not contain any reference to jurisdiction or the courts in which such suits are authorized to be brought. Likewise, the other two sections of the Miller Act, Sections 270c and d, do not relate to jurisdiction and, thus, could not support the Court of Appeals decision.

States ex rel. Owens-Corning Fiberglass Corp. v. Brandt Constr. Co., 826 F.2d 643 (7th Cir. 1987), *cert. denied*, 484 U. S. 1026 (1988), the issue was whether the underlying state court case had been properly removed. The Seventh Circuit concluded that the state case had not involved a Miller Act claim, therefore, no federal question jurisdiction could support removal. Consequently, discussion of the Miller Act in Owens-Corning is also dicta. In the course of its Opinion, however, the Seventh Circuit assumed for the purpose of argument that a Miller Act claim existed, and concluded removal would have still been improper under the derivative jurisdiction theory because "federal courts unanimously have read [Section 270b(b)] as establishing that jurisdiction of Miller Act claims is exclusively federal." Id. at 645.

Although writing after Rich, the Seventh Circuit does not discuss that decision. Instead, it cites four Circuit Court cases to support the proposition that Miller Act jurisdiction is exclusively federal. All of those cases predate Rich. Further, only two of the cases actually decide the issue.[3] Both of those cases, United States Fidelity & Guaranty Co. v. Hendry Corp., 391 F.2d 13, at n. 3 (5th Cir. 1968), *cert. denied*, 393 U.S. 978 and Koppers Co. v. Continental

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[3]In both of the other cases, Blanchard v. Terry & Wright, Inc., 331 F.2d 467 (6th Cir. 1964), *cert. denied*, 379 U.S. 831; and United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co., 297 F.2d 665 (2nd Cir. 1962), the Courts found that although the claims at issue were based on the Miller Act, jurisdiction was predicated on 28 U.S.C. §1352 because Miller Act payment bonds are bonds executed under any law of the United States.

Casualty Co., 337 F.2d 499, at 505-506 (8th Cir. 1964), acknowledged a split of authority on the issue but chose to follow the cases holding Section 270b(b) was a jurisdictional rather than a venue provision.

To the extent there was uncertainty in the Circuit Courts as to whether Section 270b(b) was a jurisdictional or venue provision when Hendry and Koppers were decided, that uncertainty was resolved by this Court in Rich. This effect is most apparent in the Eighth Circuit. That Court, deciding Koppers ten years before Rich concluded, after careful analysis, that federal courts have exclusive jurisdiction over Miller Act cases. That same Circuit deciding FGS Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3503 (U.S. Dec. 4, 1995) (No. 95-1102), twenty years after Rich held that "a federal court does not have exclusive jurisdiction over . . . Miller Act claims."[4]

Likewise, in the Fifth Circuit which decided the Hendry case, the Court is now committed to the proposition that Section 270b(b) is a venue provision and that it can be waived by general contractors and their Miller Act sureties.

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[4]Id. at 1233. The competing forum in Carlow was a tribal court, however, that distinction was not determinative of the outcome. Consequently, the holding that federal courts have concurrent jurisdiction over Miller Act claims applies with equal force whether the alternative forum is a state court or a tribal court.

In re Fireman's Fund Ins. Co., 588 F.2d 93 (5th Cir. 1979).[5] Fireman's Fund affirmed the transfer of a Miller Act case to the venue specified in a forum selection clause even though Section 270b(b) provided for a different venue.

Even in the Second Circuit, which decided the Bryant case cited in Owens-Corning, the jurisdictional nature of Section 270b(b) has been revisited. In United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705 (2nd Cir. 1966), *cert. dismissed*, 385 U. S. 924, the Second Circuit noted that Bryant had not decided whether Section 270b(b) was a venue requirement or a jurisdictional limitation. Despite dicta to the contrary in Bryant, the Capolino court held the statute was "a venue provision benefiting defendants in some cases." Id. at 707. It is not without significance that this Court's Opinion in Rich cited Capolino with approval and not Bryant. Rich, id. n. 10.

Consequently, the decision of the Tenth Circuit which is the subject of this appeal is not supported by the authority on which it purports to rely. It is also contrary to this Court's decision in Rich, and to decisions from other courts of appeal.

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[5]In addition, the Ninth Circuit has adopted the position of the dissent in Hendry. United States ex rel. Aurora Painting, Inc., v. Fireman's Fund Ins. Co., 832 F.2d 1150 (9th Cir. 1987). That case held that a state court judgment had preclusive effect in a subsequent action against the contractor's Miller Act surety.

The four courts of appeal which have decided this issue are split: the decision in this case holding federal jurisdiction is exclusive, the Eighth Circuit decision in Carlow, holding that federal court jurisdiction is not exclusive; United States ex rel. Pittsburgh Tank & Tower v. G & C Enterprises, Inc., 62 F.3d 35 (1st Cir. 1995), enforcing a forum selection clause and dismissing a Miller Act claim; and United States ex rel. Harvey Gulf International Marine, Inc. v. Maryland Casualty Co., 573 F.2d 245 (5th Cir. 1978).

Although decided after Rich, Maryland Casualty does not discuss Rich nor cite to any authority when it holds that "jurisdiction over Miller Act claims is exclusively federal." Id. at 247. The Court appears to rely on Section 270b(b). However, in light of Rich, jurisdiction of Miller Act claims cannot be premised on Section 270b(b).

Equally noteworthy is the fact that Maryland Casualty does not follow a prior decision of the Fifth Circuit, Texas Constr. Co. v. United States ex rel Caldwell Foundry and Machine Co., Inc., 236 F.2d 138 (5th Cir. 1956). That case purports to be the first federal decision on the issue and held that Section 270b(b) was a venue provision as distinguished from a jurisdictional requirement. Texas Construction is cited for that proposition by the Maryland Casualty court, however, there is no discussion of why Texas Construction is not controlling.

Finally, the Maryland Casualty decision is further questionable in light of the Fireman's Fund case decided the following year with an opposite result. Even if correct in

result, Maryland Casualty is distinguishable because the surety in that case objected to venue. Here, the surety seeks to enforce the parties' agreement as to venue.

The Court of Appeal's decision in this case, although consistent with one of the three Fifth Circuit decisions deciding this issue is contrary to every other court of appeals decision. It is contrary to the implicit resolution of this issue in Rich, and it is contrary to the express intent of Congress in 28 U.S.C. §1352. Consequently, reversal is required.

In addition, the decision of the Court of Appeals so far departs from existing case law that if allowed to stand it will return jurisprudence regarding jurisdiction and venue to the"confusing deviation" that once attended these principles. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939). The Court of Appeals concluded that the statutory language Rich held to be a venue provision was also a jurisdictional requirement. The law cannot be that specific language providing for the venue of actions is, at the same time, jurisdictional without disregarding years of accepted jurisprudence.

In fact, the law is to the contrary.

> The jurisdiction of the federal courts - their power to adjudicate - is a grant of authority to them by Congress and thus beyond the scope of litigants to confer. But the locality of a law suit - the place where judicial authority may be exercised - though defined by legislation relates to the convenience of

> litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts.

Neirbo, id. at 308 U.S. 167-168. If, as Rich held, Section 270b(b) is a venue provision relating to the convenience of the litigants and subject to their disposition, it cannot also be an exclusive grant of subject matter jurisdiction. The latter is beyond the scope of the litigants to confer by agreement, alter by contract or waive by failure to object.

The cases concluding that Section 270b(b) is a venue provision have uniformly found the purpose of that statute to be for the convenience of defendants. See, e.g. Capolino, 364 F.2d at 707. In this respect, it is like the general venue statute which "does not limit the general jurisdiction of the District Courts, or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election." Lee v. Chesapeake & O. Ry. Co., 260 U.S. 653, 655 (1923). If 270b(b) is a provision which the Petitioners may assert or waive, it cannot be jurisdictional.

A. Legislative History of The Miller Act Supports Reversal

An examination of the legislative history of the Miller Act also supports the conclusion that jurisdiction of Miller Act claims is not exclusively federal. The predecessor of the Miller Act, the Heard Act, was enacted in 1894. 28 Stat. 278. That statute required a single bond which would ensure

the contractor's performance to the United States and prompt payment of persons supplying labor and materials. In part, the statute provided that:

> Said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties.

Clearly the language of the Heard Act, as originally enacted, did not provide for exclusive federal jurisdiction. Hendry, 391 F.2d at 18.

Further, a review of reported decisions confirms that the Heard Act of 1894 was not treated as creating exclusive federal jurisdiction. See, for example, United States ex rel. Standard Furniture Co., v. Henningsen, 82 P. 171 (Wash. 1905), affirming the judgment of a furniture supplier against the surety posting a bond required by the Heard Act; and, McPhee v. United States ex rel. Montrose Hardware Co., 174 P. 808 (Colo. 1918), reversing the judgment against the United States and affirming the judgment of suppliers and materialmen such that both the United States and the suppliers were permitted to pursue their claims against the sureties which had posted Heard Act bonds on the Gunnison tunnel project.

In 1905, the Heard Act was amended to make clear that the United States had priority over suppliers and subcontractors with respect to the claims against the bond. Also added was language providing that the suit of suppliers

and subcontractors was to be brought "in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere." 40 U.S.C. §270. In reliance on this language, some state courts concluded that concurrent jurisdiction no longer existed and declined to entertain Heard Act claims. E.g., Alleva v. Maryland Casualty Co., 287 N.Y.S. 583 (N.Y.S.C. 1936).

In 1935, the Miller Act replaced the Heard Act, preserving in Section 270b(b) the language of the 1905 amendment which provided for suit in the federal district court where the project was located "and not elsewhere."[6] This language precipitated decisions which assumed that Section 270b(b) was a jurisdictional provision and, therefore, that federal courts had exclusive jurisdiction of Miller Act claims. (See, e.g. Owens-Corning, and cases cited at 826 F.2d 645-646). This position is not tenable after Rich.

From the available history, it is apparent that the Miller Act was passed to rectify difficulties existing under the Heard Act. See, e.g. Stickells, Bonds of Contractors on Federal Public Works, The Miller Act, 36 B.U.L. Rev. 499 at 502-507 (1956). The Miller Act solution to these difficulties was basically twofold: 1) protect subcontractors and suppliers by requiring a payment bond separate from the performance bond which, under the Heard Act, had often been exhausted by the claims of the United States alone; and 2) with the deletion of the Heard Act requirement that all

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[6]The Heard Act had been amended in 1911 to provide for suit in the district rather than the circuit court. 30 Stat. 1167.

claimants intervene in one action, consolidate into one forum all litigation on the new payment bond for the convenience of the contractor and surety. Section 2(a) of the Miller Act, 40 U.S.C. §270a(a), accomplished the first of these goals; Section 2(b), 40 U.S.C. 270b(b), accomplished the later.

The legislative history of the Miller Act does not indicate "that the Congress intended Section 2(b) to do more than regulate the locality of actions commenced pursuant to Section 2(a) of the Act." Capolino, 364 F.2d at 708. Consequently, neither the enactment of Section 270b(b) of the Miller Act, nor the 1905 amendment to the Heard Act from which the 270b(b) language was derived altered the concurrent jurisdiction of state and federal courts.

More importantly, there is nothing in the history or policy of federal law which is inconsistent with concurrent jurisdiction regarding the prosecution of Miller Act claims in the manner originally provided for under the Heard Act. Miller Act suits are " . . . plain and simple commercial litigation." Rich, 417 U.S. at 130. And in 1948, Congress expressly provided for concurrent jurisdiction " of any action on a bond executed under any law of the United States." 28 U.S.C. §1352 (emphasis added).

Clearly, Miller Act bonds are bonds executed under a law of the United States, specifically 40 U.S.C.§270a. Several courts have so held. E.g., Bryant, 297 F.2d at 456. If a Miller Act claim is a suit on a bond executed under a law of the United States for purposes of finding federal jurisdiction under 28 U.S.C. §1352, when no 270b(b) district court exists, it must also be a suit over which state courts

have concurrent jurisdiction pursuant to that same statute despite the dicta of the Second Circuit to the contrary. See, Bryant, 297 F.2d at 456 n. 9.

B. Federal Courts Do Not Have Exclusive Jurisdiction of Miller Act Claims

The decision of the Tenth Circuit is also contrary to general federal law on the subject of jurisdiction.

> We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.

Tafflin v. Levitt, 493 U.S. 455, 458 (1990). Pursuant to what the Tafflin Court characterized, at page 459, as a "deeply rooted presumption in favor of concurrent state court jurisdiction," this Court has found exclusive federal jurisdiction to be the exception rather than the rule.[7]

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[7]For some of the cases deciding this issue, see Tafflin, holding states have concurrent jurisdiction to hear civil RICO claims arising under 18 U.S.C. §1961-1968; Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990), holding states have concurrent jurisdiction to decide federal employment discrimination cases, arising under 42 U.S.C. §2000e; Maine v.

Further, in what appears to be a comprehensive list of "standard fields of exclusive federal jurisdiction" contained in Justice Scalia's concurring opinion in Tafflin, the Miller Act is not included. Id. at 471.

While the Supreme Court has not expressly decided this issue with respect to the Miller Act, concurrent jurisdiction is implicit in, if not mandated by, the holding in Rich. Because concurrent jurisdiction is also expressly provided for by Congress in 28 U.S.C. §1352, it seems unnecessary to engage in the Tafflin analysis. Nonetheless, excluding Section 1352 and considering the Miller Act alone, the Tafflin analysis achieves the same result: jurisdiction of Miller Act claims is concurrent.

The starting point for any determination of concurrent jurisdiction is the expressed intent of Congress contained in the language of the statute at issue. Tafflin, 493 U.S. 455; Yellow Freight, 494 U.S. 820. Rich has resolved that issue in holding that Section 270b(b) is a venue provision. Consequently, it cannot be the "explicit statutory directive"

Thiboutot, 448 U.S. 1 (1980), holding states have concurrent jurisdiction to hear federal civil rights claims arising under 42 U.S.C. §1983; Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), holding states have concurrent jurisdiction to hear claims arising under Section 301 of the Federal Labor Relations Act, 29 U.S.C. §185; Yates v. Jones National Bank, 206 U.S. 158 (1907), holding states have concurrent jurisdiction to decide national banking issues; and, Claflin v. Houseman, 93 U.S. 130 (1876), holding states had concurrent jurisdiction over certain federal bankruptcy issues prior to the amendment of 28 U.S.C. §1334(a) expressly giving federal courts exclusive jurisdiction of these issues.

of exclusive federal jurisdiction required by Tafflin and Yellow Freight. No other provision of the Miller Act contains any discussion of jurisdiction much less the expressed intent of Congress sufficient to rebut the "deeply rooted" presumption in favor of concurrent jurisdiction.

As previously demonstrated, there is nothing in the legislative history of the Miller Act which suggests that Congress intended for the federal courts to be the only forum in which Miller Act claimants could pursue their claims.

Even the incompatibility factors discussed in Tafflin support concurrent jurisdiction. As the Rich court noted, a Miller Act case is nothing more than common, ordinary commercial litigation. Federal courts have no particular expertise in resolving construction contract disputes, nor disputes between general contractors and their suppliers and subcontractors. State courts regularly decide these issues, both with respect to lien claimants and in cases where state law requires a Miller Act type payment bond. State courts regularly decide these cases with no less "hospitality" than federal courts.

Uniformity of interpretation is provided by the payment bond. Depending on the facts of each particular case, any unpaid supplier or subcontractor who proves entitlement to payment will be paid, at least by the surety. Because the facts of each case will determine the outcome, and because those facts will generally differ from case to case, additional uniformity is achievable only if one judge is designated to decide all Miller Act claims.

Further, it is inconceivable that Congress considers state courts competent to adjudicate every case filed on any bond issued under any law of United States except the Miller Act. See, 28 U.S.C. §1352. As in Tafflin, it would also seem inconceivable that an arbitrator would be considered competent to resolve a Miller Act claim but a state court judge would not.[8] Tafflin, 493 U.S. at 466. To the extent federal law controls in a Miller Act case, that law can be applied with equal force by a state court judge and facilitate the federal right of action granted in Section 270b(a). Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, at 478, n. 4 (1981); Free v. Bland, 369 U.S. 663 (1962).

Finally, like the RICO statute at issue in Tafflin, the Miller Act is remedial in nature and should be liberally construed.[9] Therefore, concurrent state court jurisdiction over Miller Act claims will "advance rather than jeopardize

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[8]While this Court has not specifically decided the enforceability of arbitration clauses in Miller Act cases, there is little doubt that they are enforceable. Shearson/American Express, Inc., v. McMahon, 482 U.S. 220 (1987), enforcing arbitration clauses in RICO cases; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), enforcing arbitration clauses in antitrust cases; Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), enforcing arbitration clauses in 1934 Act securities cases; and Capolino, 364 F.2d at 705 (1966), *cert. denied*, 385 U.S. 924 (1966), enforcing an arbitration clause in a Miller Act case.

[9]Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co., 322 U.S. 102 (1944); Fleisher Engineering & Constr. Co. v. United States ex rel. Hallenbeck, 311 U.S. 15 (1940).

federal policies underlying the statute." Tafflin, 493 U.S. at 467.

Consequently, even though the clear implication of Rich is that federal and state courts have concurrent jurisdiction of Miller Act claims, it appears that if this issue were expressly decided, concurrent jurisdiction would also be the result.

II. Interpretation Of This Forum Selection Clause Requires Reversal

In order to reach its result in this case, the Court of Appeals interpreted the contract language at issue to designate the state court in Bexar County, Texas, as the only court in which suit could be brought. With this interpretation, the Court of Appeals did not believe this case could be transferred to the United States District Court for the Western District of Texas, the federal court having jurisdiction over Bexar County. 28 U.S.C. §124(d)(4).

The contract provides in paragraph 35(c): "The Subcontract Agreement and any claims arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas." The contract language does not contain the words "state court," leaving open to interpretation the meaning of this language. Several courts have interpreted the same or similar language and reached different results as to whether the language

refers to state and federal courts or state courts only.[10] The parties to this appeal differ on their interpretation of this language.

B & D appealed the District Court's dismissal pursuant to Rule 12(b)(3), arguing that North American's Motion to Dismiss should be analyzed as a motion to transfer based on the convenience of the parties under 28 U.S.C. §1404(a). Citing Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988), B & D took the position that the language at issue should be interpreted as referring to state or federal court and Section 1404(a) should apply because the Western District of Texas was a district where the original action "might have been brought." Under the balancing test applied in Stewart to Section 1404(a) motions,

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[10]Cf. Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342 (10th Cir. 1992), holding removal pursuant to 28 U.S.C. §1441 et. seq. was improper where the contract provided that "venue shall be proper . . . in Johnson County, Kansas"; Pittsburgh Tank, 62 F.3d at 36, treating a forum selection clause providing for venue in Burlington County, New Jersey as permitting transfer to the federal court having jurisdiction over Burlington County even though the physical location of the federal court for the District of New Jersey is located in a different county, 28 U.S.C. §110; and Arrow Plumbing and Heating, Inc. v. North American Mechanical Services Corp., 810 F.Supp. 369 (D.R.I., 1993) where the parties treated this identical language as referring to the state or federal court in Texas. In that case, the court held that a motion to transfer for improper venue, under §1406(a) rather than for convenience of the parties under §1404(a), is appropriate where the moving party seeks to enforce a contractual forum selection clause.

B & D contended that the factors favoring retention of the case outweighed those favoring transfer.

Although the meaning of this language had not been an issue in the District Court, (App. 20), North American responded arguing that Stewart did not apply for two reason: First, no 1404(a) motion to transfer had been filed. Second, the contract should be construed as designating a state court forum which would render Section 1404(a) inapplicable.

Clearly, the parties disagreed on their interpretation of the contract language, raising an issue of fact. While construction of contracts is a matter of law, interpretation of contracts is a question of fact dependent on the intent of the parties. Nunn v. Chemical Waste Management, Inc., 856 F.2d 1464, at 1467 (10th Cir. 1988). Consequently, the Court of Appeals "interpretation" of the contract language resulted from impermissible fact finding by an appellate court. Because this erroneous conclusion was the sole basis on which the Court of Appeals reached the result in its Opinion reversing dismissal by the District Court, the decision of the Court of Appeals must be reversed.

Further, and regardless of the interpretation of this contract, it is undisputed that the parties, by this language, did not intend to litigate in Oklahoma. "It is fundamental that a contract shall receive that interpretation which would best effectuate the manifest intention of the parties." Socony Mobil Oil Co. v. Humble Oil & Refining Co., 387 F.2d 155, 157 (10th Cir. 1967). The Court of Appeals' interpretation ignores this principle.

North American moved to dismiss this case pursuant to Rule 12(b)(3). At oral argument and in supplemental briefing, when B & D first raised the exclusivity of federal court jurisdiction over Miller Act cases, North American acknowledged that as an alternative to dismissal, there was authority for the Court of Appeals to transfer this case to the Western District of Texas. See e.g. Pittsburgh Tank, 62 F.3d at 36, and Arrow Plumbing, 810 F.Supp. at 371.

Regardless of its interpretation of the contract, North American indicated its willingness to try this case in the Western District of Texas if dismissal would somehow result in injustice to B & D. If, as the Court of Appeals concluded, this forum selection clause designates state court as the exclusive forum for the parties' litigation, the only result that cannot be obtained is for this case to be remanded for trial in Oklahoma.

In Pittsburgh Tank, the First Circuit affirmed the dismissal of the subcontractor's claim on the basis of a forum selection clause which provided for a forum inconsistent with Section 270b(b). The Court decided against transfering the case pursuant to 28 U.S.C. §1406(a) because the subcontractor did not request that relief. The Court observed that even if enforcement of the forum selection clause to which the subcontractor had agreed resulted in the loss of its Miller Act claim, the subcontractor could still sue on the subcontract under state law without the Miller Act claim.

By implying that the subcontractor could not pursue its Miller Act claim in state court, the First Circuit does not

appear to have considered the impact of 28 U.S.C. §1352, specifically authorizing state court actions on federal bonds. It is not clear whether this issue was raised in Pittsburgh Tank. However, North American specifically argued the availability of Section 1352 as a basis for state court jurisdiction. The Court of Appeals did not address or discuss this issue but obviously rejected the argument in concluding that Miller Act jurisdiction was exclusively federal.

This conclusion, however, cannot result in remand as ordered by the Court of Appeals. Previous decisions of this Court affirm the "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). A forum selection clause designating a state court forum only is indistinguishable from an agreement to arbitrate which this Court considers "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).[11]

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[11]By analogy, this forum selection clause would posit the situs of suit in Bexar County, however, the procedure would still be primarily federal. In n. 13 of Scherk, this Court considered the application by implication of the law of the forum. In the Miller Act context, federal law would still be applied by a state court in resolving issues related to the federal right of action created by that statute. See Rich, 417 U.S. 116; Free v. Bland, 369 U.S. 663.

Assuming the Court of Appeals is correct and federal courts have exclusive jurisdiction over Miller Act claims, there is no reason why a party may contract as in Mitsibushi to resolve by arbitration in Japan federal antitrust claims over which federal courts have exclusive jurisdiction, but could not agree to resolve Miller Act claims in a state court. The enforcement of the arbitration agreement in Scherk is also indistinguishable from this case even though federal courts have exclusive jurisdiction of actions under the Securities Exchange Act of 1934.

Paragraph 35c of the subcontract at issue in this case does not confer jurisdiction on the federal courts by agreement of these parties. There is no question that the federal courts have the power to adjudicate Miller Act claims. To the extent Neirbo is relied on by the Court of Appeals for the proposition that parties cannot confer jurisdiction, it is not applicable.

Further, these parties have not agreed to forego the substantive rights afforded by the Miller Act. They have only agreed to submit them to a state rather than a federal forum. Cf. Mitsubishi, 473 U.S. at 628. Certainly, this contract does not confer on the State Court of Bexar County, Texas, jurisdiction to decide this contract dispute which that Court was not empowered by the Constitution of Texas to resolve.

If, as the Court of Appeals concluded, these parties agreed to resolve their disputes in Texas State Court, to the exclusion of any other judicial forum, affirmance of the District Court's dismissal, not remand for trial in Oklahoma,

is required. Pittsburgh Tank, 62 F.3d at 37.[12] Elimination of inconvenience and uncertainty through agreements in advance of litigation on an acceptable forum for that litigation is no less an "indispensable element" of interstate trade than of international trade. See Scherk, 417 U.S. at 518. "[E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." Stewart, 487 U.S. at 33, Kennedy, J. concurring.

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[12]As in Pittsburgh Tank, B & D has not, and could not, show any reason why it would be unable to pursue its claims for non-payment in Texas state courts. In Jim Cooley Construction, Inc. v. North American Construction Corp. and St. Paul Mercury Insurance Co., Case No. CIV-93-1813, decided by the District Court for the Western District of Oklahoma prior to the B & D case, North America's motion to dismiss based on the same forum selection clause was also granted. Cooley refiled its claim in Texas State Court. The case was resolved by settlement prior to the scheduled trial date.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 1996

APPENDIX

APPENDIX

TABLE OF CONTENTS

Document	Page
DECISION, United States Court of Appeals for the Tenth Circuit, dated November 13, 1995	App 1
PETITION FOR REHEARING, United States Court of Appeals for the Tenth Circuit, filed November 24, 1995	App 9
ORDER, denying Petition for Rehearing; United States Court of Appeals for the Tenth Circuit, dated December 11, 1995	App 18
ORDER, granting North American's Motion to Dismiss; United States District Court for the Western District of Oklahoma, entered in judgment docket on August 22, 1994	App. 20
Subcontract	App. 23

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES for the use of B & D MECHANICAL CONTRACTORS, INC., an Oklahoma corporation,

Plaintiff-Appellant and Cross-Appellee,

v.

Nos. 94-6448 & 94-6355

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation, and NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants-Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-94-2540-W)

Kent Frates and Kurt M. Rupert of Hartzog Conger & Cason, Oklahoma City, for Plaintiff-Appellant and Cross-Appellee.

John F. Fischer (Don G. Holladay with him on the briefs) of Andrews Davis Legg Bixler Milsten & Price, Oklahoma City, Oklahoma, for Defendants-Appellees and Cross-Appellants.

Before MOORE, ANDERSON and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

This case addresses whether a valid forum selection clause can override the venue provisions of the Miller Act, 40 U.S.C. §270b(b). We hold that it does but find the forum selection clause at issue in this case invalid. The district court's order dismissing the case for lack of venue is reversed.

North American Construction Corporation (hereinafter "North American") contracted with the United States to install part of a ground water treatment system at Tinker Air Force Base in Midwest City, Oklahoma. St. Paul Mercury Insurance Company (hereinafter "St. Paul") provided the payment bond to North American for the project. B & D Mechanical Contractors, Inc. (hereinafter

"B&D") entered into a subcontract with North American to provide labor and services in the completion of the water treatment system. The subcontract contained a forum selection clause stating: "The Subcontract Agreement and any claims arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas."

B&D filed claims against North American and St. Paul under the Miller Act, 40 U.S.C. §270a-c, and for breach of contract, in the United States District Court for the Western District of Oklahoma. North American and St. Paul moved to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3). The district court granted the motion to dismiss holding that the Miller Act's venue provision was waived by the subcontract's forum selection clause. B&D appealed. North American and St. Paul cross-appealed the district court's order denying them attorney's fees.

II.

B&D raises three issues on appeal: (1) whether the district court erroneously concluded that the forum selection clause in the subcontract mandated the case be brought in Bexar County, Texas; (2) whether the district court improperly resolved a factual issue against B&D in its ruling on North American's and St. Paul's Motion to Dismiss for Improper Venue; and (3) whether enforcing the forum selection clause would be unreasonable under the facts and circumstances of this case.

III.

B&D contends the district court erred in granting North American's and St. Paul's Motion to Dismiss for Improper Venue. We review a motion to dismiss based on the validity of a forum selection do novo. *Riley v. Kingsley Underwriting Agency, Ltd.*, 969 F.2d 953, 957 (10th Cir.), *cert. denied*, 113 S. Ct. 658 (1992).

The interpretation of the Miller Act's venue provision in relation to a forum selection clause is an issue of first impression in the Tenth Circuit. Congress enacted the Miller Act to protect persons who supply labor and materials for the construction of federal buildings. Due to its remedial nature it is afforded a liberal construction. *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 216 (1957).

Although the language of the Miller Act, 40 U.S.C. §270b(b), requiring that suits be brought in the judicial district where the contract was performed "and not elsewhere" seems to mandate strict conformance, judicial interpretation holds otherwise. While dealing with the merits of another issue, the Supreme Court characterized § 270b(b) as being "merely a venue requirement." *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 125 (1974). In *United States ex rel. Pittsburgh Tank & Tower, Inc. v. G&C Enterprises, Inc.*, 62 F.3d 35, 36 (1st Cir. 1995), the court held a contractual forum selection clause prevailed when it conflicted with the venue designated by the Miller Act. The *G&C Enterprises* court noted that even though the Supreme Court was not addressing a

conflicting forum selection clause in *F.D. Rich*, the Court's designation that the statutory language was a mere venue requirement was "explicit and very hard for a lower federal court to ignore." *Id* at 36. This court also finds such a designation hard to ignore. Interestingly, even prior to the *F.D. Rich* decision, courts deciding the issue had held almost without exception that the provision was a venue requirement. *United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705, 707 (2d Cir.), *cert. denied*, 385 U.S. 924 (1966). It is well settled that venue provisions are subject to contractual waiver. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964).

Three circuits have addressed forum selection clauses that conflict with the Miller Act's venue provisions. All three have held that as a mere venue requirement, § 270b(b) is subject to contractual waiver by a valid forum selection clause. *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (holding the Miller Act's venue requirement could be waived by defendants); *G&C Enterprises*, 62 F.3d at 36; *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (holding the case for overriding the Miller Act particularly strong where forum selection clause was suggested by defendants -- the parties the act was designed to protect).

We are persuaded by our sister circuits and agree that a valid forum selection clause supersedes the Miller Act's venue provision. This case thus turns on whether the forum selection clause at issue is valid. To interpret a contract we

"must give a written agreement that interpretation which was intended by the parties." *Ader v. Hughes*, 570 F.2d 303, 309 (10th Cir. 1978). The clause at issue states that any claims arising under the contract shall be governed by Texas state law "and exclusive venue shall be proper in Bexar County, Texas." Those parties to this appeal, St. Paul and North American, urging us to apply the forum selection clause, state in their brief that "the contract at issue in this case designates a state court forum only." The parties selection of a state court forum is fatal to the clause's enforceability.

Although parties are able to contractually alter the Miller Act's venue provision, they are not able to change its jurisdictional requirements. As Justice Frankfurter stated in *Neirbo Co. v. Bethlehem Shipbuilding Corp.* 308 U.S. 165 (1939):

> The jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by congress and thus beyond the scope of litigants to confer. But the locality of a lawsuit -- the place where judicial authority may be exercised -- though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.

Id. at 167-68. The Miller Act grants federal courts exclusive jurisdiction. *United States v. Brandt Constr. Co.*, 826 F.2d 643, 645 (7th Cir. 1987) (discussing how federal courts have unanimously held Miller Act jurisdiction to be exclusively federal), *cert. denied*, 484 U.S. 1026 (1988).

See also United States ex rel. General Rock & Sand Corp. v. Chuska Dev. Corp., 55 F.3d 1491, 1493 (10th Cir. 1995). In a supplemental brief, St. Paul and North American suggest the federal district court for the Western District of Texas as an alternate forum; however, neither they nor we can rewrite the subcontract to choose a valid forum for them. Therefore, this forum selection clause which attempts to divest the federal courts of their exclusive jurisdiction to hear this case is void and unenforceable.

Because the forum selection clause is invalid, the Miller Act's venue provisions prevail and this case must be brought in the United States District Court for the Western District of Oklahoma, the federal district where the contract was to be performed.

The invalidity of the forum selection clause renders B&D's other assertions moot.

Our reversal of the district court's dismissal for improper venue renders North American's and St. Paul's cross-appeal moot. As they are no longer the "prevailing parties" within the meaning of the attorney fee provision or the subcontract on this issue, they are clearly not entitled to attorney's fees regardless of any contractual interpretation.

IV.

We find the forum selection clause to be an invalid waiver of the Miller Act's venue provision. The district

court's judgment is REVERSED and this case is REMANDED to the district court for a trial on the merits.

Our holding renders North American's and St. Paul's cross-appeal moot.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES for the use of B & D MECHANICAL CONTRACTORS, INC., an Oklahoma corporation,

Plaintiff-Appellant,
Cross-Appellee,

No. 94-6348
v. No. 94-6355
(D.C. No. CIV-94-0254-W)

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation, and NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants-Appellees,
Cross-Appellants.

PETITION FOR REHEARING

St. Paul Mercury Insurance Company ("St. Paul") and North American Construction Corporation ("North American") (collectively "Appellees"), pursuant to Rule 40 of the Federal Rules of Appellate Procedure and Rule 40 of the Rules of the United States Court of Appeals for the Tenth Circuit, petition the Court for Rehearing of the Judgment entered in this case on November 13, 1995, for the following reasons:

1. The court has misconstrued the jurisdiction of the federal courts in Miller Act cases.

2. The court has misapprehended the intent of the parties to this contract.

Because the issue decided by this Court was not raised by Appellant until oral argument, it has not been fully briefed and Appellees submit, therefore, that rehearing is appropriate.

I.
FEDERAL COURTS DO NOT HAVE EXCLUSIVE JURISDICTION OF MILLER ACT CLAIMS

> "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. . . . As we noted in Claflin, 'if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction . . . .'"

Tafflin v. Levitt, 493 U.S. 455, 458-459 (1990). Pursuant to what the Tafflin Court characterized, at page 459, as a "deeply rooted presumption in favor of concurrent state court jurisdiction," the Supreme Court has found exclusive federal court jurisdiction to be the exception rather than the rule.[1]

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[1]For some of the cases deciding this issue, see Tafflin, holding states have concurrent jurisdiction to hear civil RICO claims arising under 18 U.S.C. §1961-1968; Yates v. Jones National Bank, 206 U.S. 158 (1907), holding states have

The Supreme Court has not decided this issue with respect to the Miller Act, and only three Courts of Appeal have. Other than the decision in this case, this issue was most recently decided by the Eighth Circuit in FGS Constructors, Inc. v. Carlow, 64 F.3d 1230 (8th Cir. 1995), a case cited as persuasive authority by this Court. Carlow, however, held that "a federal court does not have exclusive jurisdiction over . . . Miller Act claims."[2]

In deciding that the Miller Act grants federal courts exclusive jurisdiction (Opinion p. 6), this Court did not distinguish Carlow. Instead, this Court cited a decision of the Seventh Circuit and an earlier decision of the Tenth

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concurrent jurisdiction to decide national banking issues; Claflin v. Houseman, 93 U.S. 130 (1876), holding states had concurrent jurisdiction over certain federal bankruptcy issues prior to the amendment of 28 U.S.C. §1334(a) expressly giving federal courts exclusive jurisdiction of these issues; Maine v. Thiboutot, 448 U.S. 1 (1980), holding states have concurrent jurisdiction to hear federal civil rights claims arising under 42 U.S.C. §1983; Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990), holding states have concurrent jurisdiction to decide federal employment discrimination cases, arising under 42 U.S.C. §2000e; and, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), holding states have concurrent jurisdiction to hear claims arising under Section 301 of the Federal Labor Relations Act, 29 U.S.C. §185.

[2]64 F.3d at p. 1233. The competing court in Carlow was a tribal court, however, that distinction was not determinative of the outcome. Consequently, the holding that federal courts have concurrent jurisdiction over Miller Act claims applies with equal force whether the alternative forum is a state court or a tribal court.

Circuit to support this proposition. Neither case, however, decided this issue. The Tenth Circuit case, held that a letter of credit required by an Indian housing authority was not a "payment bond" required by the Miller Act; consequently, "the Miller Act [did] not apply." General Rock & Sand Corp. v. Chuska Development, 55 F.3d 1491 (10th Cir. 1995).

Chuska does contain the statement that Section 270b(b) of the Miller Act grants federal courts exclusive jurisdiction. However, if that issue was before the Court, it was mooted by the holding that the Miller Act did not apply. Most importantly, this statement is absolutely contrary to controlling authority of the United States Supreme Court as well as the holding of this court in this case. (See Opinion pp. 4-5). In F.D. Rich Co. v. Industrial Lumber, 417 U.S. 116 (1974), the Supreme Court held, at p. 125, that " . . . §270b(b) is merely a venue requirement." Therefore, Section 270b(b) is not a grant of jurisdiction, exclusive or otherwise.

Owens-Corning Fiberglass v. Brandt Construction Company, 826 F.2d 643 (7th Cir. 1987), the other Circuit case cited by this court, did not decide this issue either. Brandt also held that the case before it was not based on the Miller Act. In reaching this determination, the court observed, at page 645, that many courts had found Section 270b(b) to be a grant of exclusive jurisdiction to the federal courts. Each of the cases cited by Brandt was decided before the Supreme Court's 1974 decision in Rich. Consequently, their reliance on Section 270b(b) as a jurisdictional provision cannot stand.

Since 1974, the only other Circuit Court to decide this issue is the Fifth Circuit. See, United States v. Maryland Casualty Company, 573 F.2d 245 (5th Cir. 1978). Although decided after Rich, Maryland Casualty does not cite to any authority when it holds that " . . . jurisdiction over Miller Act claims is exclusively federal." (573 F.2d at p. 247). It appears to rely on Section 270b(b). However, in light of Rich, exclusive federal jurisdiction of Miller Act claims cannot be premised on Section 270b(b).

Because Section 270b(b) is a venue provision, the grant of jurisdiction to federal courts to hear Miller Act claims must come from some other provision. Section 270a does not do so. That Section establishes the requirement under federal law for performance and payment bonds on certain government construction projects. Section 270b(a) grants to subcontractors and suppliers a right of action to sue on the payment bond required by Section 270a: "Every person who has furnished labor or material . . . shall have the right to sue on such payment bond." However, if this is a grant of jurisdiction to the federal courts, it is by implication. Without question, there is no express reservation necessary for exclusive jurisdiction in this provision. Tafflin, supra.[3]

There is an express grant of jurisdiction to the federal courts to hear Miller Act claims in 28 U.S.C. §1352.

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[3]The other provisions of the Miller Act are not relevant to this issue and provide no basis for jurisdiction.

> "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title."

Clearly, an action on the payment bond required by Section 270a is an "action on a bond executed under any law of the United States". Likewise, Section 1352 settles any doubt about the concurrent jurisdiction of state courts to decide the " . . . plain and simple commercial litigation" involved in Miller Act claims. Rich, supra at p. 130.

II.
INTERPRETATION OF THIS FORUM SELECTION CLAUSE IS NOT DISPOSITIVE

In reversing the lower court's decision, this Court held that the parties' selection of a state court forum is fatal to the forum selection clause's enforceability. (Opinion p. 5). This decision rests on the conclusion that the parties intended through the forum selection clause at issue to designate the state court in Bexar County, Texas, exclusive of the federal court there as the only forum for litigation.

In responding to appellants' argument that this case should be decided under 28 U.S.C. § 1404, North American argued that this forum selection clause should be construed to designate a state court forum. However, there was no determination by the District Court to that effect nor was the determination of that issue necessary to resolve Appellees' Motion to Dismiss. The District Court upheld the forum selection clause based on the premise that such clauses are prima facie valid and are enforceable unless enforcement

would be unreasonable. Order at p. 3. Appellant was then free to refile its case in state or federal court in Texas.

While North American's construction of the forum selection clause as designating a state court forum is supported by case law[4] other courts have interpreted the same language as designating a state or federal court. See U.S. on Behalf of Pittsburgh Tank & Tower, Inc. v. G & C Enterprises, Inc., 62 F.3d 35, at p. 36 (1st Cir. 1995).

Most significantly, the identical language in a contract with another North American subcontractor has been interpreted by the United States District Court for the District of Rhode Island to permit transfer of a Miller Act case under 28 U.S.C. §1406(a) to the United States District Court for the Western District of Texas. Arrow Plumbing and Heating, Inc. v. North American Mechanical Services Corp., 810 F.Supp. 369 (D.R.I., 1993).

Regardless of whether the language of this contract evidences an intent to litigate in state or federal court or in state court only, it is absolutely clear that the parties did not intend to litigate in Oklahoma.

At oral argument, Appellees indicated their willingness for this court to affirm the dismissal or transfer this case to the Western District of Texas, the federal court having jurisdiction over Bexar County. Regardless of the court's construction of the contract language, this Court has authority under 28 U.S.C. §1406 to transfer the case to the Western District of Texas, in the "interest of justice".

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[4]For example, see Lambert v. Kysar, 983 F.2d 1110 (1st Cir. 1993).

If the case were dismissed, it is possible that refiling of B & D's Miller Act claim could be precluded by the one-year jurisdictional statute of limitations. Appellees moved to dismiss, not to deprive B & D of its Miller Act claim but to enforce their agreement with B & D to litigate in Bexar County, Texas. To avoid that potential result, even though dismissal is proper, North American and St. Paul, as they stated at oral argument, are willing to litigate in the Federal District Court for the Western District of Texas even if their contract designates the State Court there as the proper forum. This result is consistent with the parties' agreement, this Court's authority under Section 1406 and the result in Arrow Plumbing, supra.

CONCLUSION

B & D's argument that this forum selection clause is improper because it ousts a court of jurisdiction has been criticized as a "vestigial legal fiction." Bremen v. Zapata Off-Shore Company, 407 U.S. 1, 12 (1972). Although B & D has not made the argument, if enforcement of this clause would be unreasonable or unjust in that dismissal would result in the loss of B & D's Miller Act claim; transfer under Section 1406 would prevent that result. No other reason has been put forth which would provide a ". . . basis for concluding that it would be unfair, unjust or unreasonable to hold [B & D] to his bargain." Bremen, supra, at p. 18.

WHEREFORE, Appellees submit that the Judgment of the District Court should be affirmed or that the case should be remanded for transfer to the United States District Court for the Western District of Texas.

/s/_____
JOHN F. FISCHER, OBA #2927
DON G. HOLLADAY, OBA #4292
of
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main Street
Oklahoma City, OK 73102
(405) 272-9241

ATTORNEYS FOR
DEFENDANTS-APPELLEE,
CROSS-APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of November, 1995, a true and correct copy of the foregoing document was placed in the United States Mail, postage prepaid, addressed to:

Kent Frates
Kurt M. Rupert
HARTZOG CONGER CASON & HARGIS
1600 Bank of Oklahoma Plaza/201 Robert S. Kerr
Oklahoma City, OK 73102

_____
/s/ John F. Fischer

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, for the use of B&D Mechanical Contractors, Inc., an Oklahoma corporation,

Plaintiff - Appellant,
Cross-Appellee,

v.

Nos. 94-6348
94-6355

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation; NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants - Appellees
Cross-Appellants.

ORDER
Entered December 11, 1995

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by appellees/cross-appellants.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

PATRICK FISHER, Clerk

/s/_____
By Opal A. Carter
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES for the use of B & D MECHANICAL CONTRACTORS, INC., an Oklahoma corporation,

Plaintiff,

vs.

No. CIV-94-254-W

ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation, and NORTH AMERICAN CONSTRUCTION CORPORATION, a Texas corporation,

Defendants.

ORDER

This matter comes before the Court on the Motion to Dismiss and Motion to Consolidate filed by defendants North American Construction Corporation (NACC) and St. Paul Mercury Insurance Company (St. Paul). The plaintiff, United States f/u/o B & D Mechanical Contractors, Inc. (B&D), has responded in opposition to the motions and the defendants have replied. Based upon these submissions and the decision in Jim Cooley Construction, Inc. v. North American Construction Corp., No. CIV-93-1813-A (W.D. Okla. Dec. 10, 1993), the Court makes its determination.

B & D has alleged in this action a breach by NACC of a Subcontract Agreement executed by B&D and NACC. B&D has sought recovery against St. Paul, as surety for NACC, under the Miller Act, 40 U.S.C. § 270b.

The defendants have argued that dismissal of this action is warranted because venue is improper in this judicial district. In support of this argument, the defendants have relied upon Paragraph 35(C) of the Subcontract Agreement that provides

> "[t]he Subcontract Agreement and any claims arising under it shall be governed by the laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas."

The plaintiff has argued that this forum selection clause should not be enforced because it is seeking payment for labor and services which are not the subject of the Subcontract Agreement, or any modification thereto, because the Miler Act and its venue provision override Paragraph 35(C) and because enforcement would be unreasonable under the circumstances.

In this connection, the plaintiff has contended that a portion of its claim against NACC is based upon labor and services provided under the terms of a letter dated August 27, 1993, which is a separate contract between the parties and which contains no forum selection clause. The record, however, demonstrates that the plaintiff's claim is based upon work performed pursuant to, and within the scope of, the Subcontract Agreement, or a modification thereto. The letter is not a second, separate contract between the parties and provides no basis to disregard the forum selection clause agreed to by the parties.

As stated, the plaintiff has also argued that section 270b(b) of the Miller Act controls the issue of venue in this matter. This section provides that suit shall be brought "in

the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U.S.C. §270(b). Case law, however, teaches that section 270b(b), which was enacted to benefit defendants, is not jurisdictional; its venue provisions may be waived or overridden by a valid forum selection clause.

Finally, the plaintiff has argued that it would be unreasonable to enforce Paragraph 35(C) in this case and to require the plaintiff to litigate this matter in Bexar County, Texas. Forum selection clauses are prima facie valid and are enforceable unless enforcement would be unreasonable. The plaintiff has not established that enforcement of the forum selection clause in the Subcontract Agreement would be unjust, arbitrary or contrary to law under the circumstances of this case.

Accordingly, the Court GRANTS the defendants' Motion to Dismiss filed July 6, 1994, and having determined the issue of venue to be dispositive of this matter, deems MOOT the defendants' Motion to Consolidate filed the same day.

ENTERED this 22nd day of August, 1994.

/s/_____
LEE R WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON 8-22-94

NORTH AMERICAN CONSTRUCTION CORP.

P.O. Box 690350
San Antonio, Texas 78269
(512) 492-8944

SUBCONTRACT AGREEMENT

Subcontract No. B-623-907 (CC 143)

Subcontractor's Employers Federal ID No. 731315801

Subcontractor's Average Annual Receipts for the Past Three (3) years 1,600,000.02

Number of Subcontractor's Full-Time Employees 10

THIS AGREEMENT, made this 7th day of April, 1992, by and between NORTH AMERICAN CONSTRUCTION CORPORATION, party of the first part, hereinafter called the "CONTRACTOR", and the below named party of the second part,

Name: B & D MECHANICAL [BOB BASSITT PHONE (405) 634-7425/FAX (405) 632-9744]

Address: 2330 S.W. 27th, OKLAHOMA CITY, OK 73108

hereinafter called the "SUBCONTRACTOR", which is a X Corporation, _____ Partnership, _____ Sole Proprietorship, _____ Other organized and existing under the laws of the State of Okla.

WITNESSETH

WHEREAS, the CONTRACTOR has heretofore entered into a contract, hereinafter referred to as the "ORIGINAL CONTRACT," dated SEPTEMBER 26, 1991 and described as Contract No. DACA56-91-C-0110 and more fully described as 3001 BUILDING GROUNDWATER TREATMENT SYSTEM/TINKER AFB, OK with the United States Government, hereinafter referred to as the "PRINCIPAL," which contract and all amendments includes the work described in Provision 36 (page 12) of this Subcontract Agreement to be completed by SUBCONTRACTOR under and in accordance with this Subcontract Agreement (Provisions 1 through 36 of pages 1 through 12). SUBCONTRACTOR is responsible for procuring all existing and future amendments.

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, the CONTRACTOR and the SUBCONTRACTOR do hereby mutually agree as follows:

* * * *

35. OTHER AGREEMENTS:

C. The Subcontract Agreement and any claims arising under it shall be governed by the Laws of the State of Texas and exclusive venue shall be proper in Bexar County, Texas.

* * * *